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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

DOWELANCO, EPCO, INC. and ROFAN SERVICES INC.,

Petitioners,

v.

LIBBY SLEATH, MARY ANN HAYES, GLENDA TRUESDELL and MARY OWEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A preemption provision of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v(b), states that "[a] State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." Nine federal circuit courts of appeals and at least thirteen state courts of last resort have held that this statute preempts state law causes of action for damages that are based upon the labeling accepted by the United States Environmental Protection Agency ("EPA") for a FIFRA-registered pesticide. In the present case, however, the Supreme Court of Montana departed from this large body of precedent, overruled its own precedent, and held that FIFRA does not preempt state law damages actions that challenge the labeling for a federally-registered pesticide. The stated ground for this reversal of course was an *amicus curiae* brief the United States filed in an earlier and unrelated case in the Supreme Court of California. The Montana Supreme Court concluded that the arguments advanced in the *amicus* brief were entitled to deference under federal law. Based on the arguments in the *amicus* brief, the Montana Supreme Court held that the term "requirements" in FIFRA's preemption provision does not include state law damages actions — a proposition majorities of this Court have twice rejected in the context of similar federal preemption statutes. The question presented is:

> Whether the preempted state law "requirements" under FIFRA's preemption provision, 7 U.S.C. § 136v(b), include state law causes of action for damages that are based on the EPA-accepted labeling for a FIFRA-registered pesticide.

RULE 14.1(b) STATEMENT

The following are parties to the proceeding in the Supreme Court of Montana:

1. Libby Sleath
2. Mary Ann Hayes
3. Glenda Truesdell
4. Mary Owen
5. Epco, Inc.
6. Rofan Services Inc.
7. DowElanco

The following additional persons and entities are parties to the underlying lawsuit in the trial court:

1. West Mont Home Health Services, Inc.
2. West Mont Home Management Services, Inc.
3. Orkin Extermination Company

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

DowElanco was an Indiana general partnership formed October 31, 1989 between Rofan Services Inc. and Epco, Inc. Rofan Services Inc. is a wholly-owned subsidiary of The Dow Chemical Company ("Dow"). Epco, Inc. was a wholly-owned subsidiary of Eli Lilly and Company. On July 1, 1997, DowElanco became DowElanco LLC, a Delaware limited liability company wholly owned by Dow. Effective January 1, 1998, DowElanco LLC's name was changed to Dow AgroSciences LLC. It remains an indirect wholly-owned subsidiary of Dow.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 14.1(b) Statement	ii
Rule 29.6 Corporate Disclosure Statement	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	xv
Opinions Below	1
Jurisdiction	1
Statute Involved	4
Statement of the Case	4
Reasons for Granting the Writ	6
I. The Opinion Of The Supreme Court Of Montana Conflicts With This Court's Holdings Under Analogous Federal Preemption Statutes.	6
II. The Opinion Of The Montana Supreme Court Conflicts With Overwhelming Authority Holding That FIFRA Preempts State Law	

Contents

	Page
Damages Actions That Challenge The Labeling For A Federally-Registered Pesticide.	12
III. The Opinion Of The Montana Supreme Court Threatens Seriously To Erode Federal Policy.	14
A. Labeling Is Central To FIFRA's Regulatory Scheme.	14
B. The Decision Below Threatens The FIFRA Labeling Scheme Based Upon An Erroneous View Of The Legal Effect Of The EPA *Amicus* Brief Under Federal Law.	18
IV. Other Arguments The Montana Supreme Court Adopted From The EPA *Amicus* Brief Are Misguided.	23
A. "Silence" In The Legislative History.	23
B. Supposed "Evidence" In The Legislative History.	24
C. Supposed "Conflict" With FIFRA's Purposes.	25
Conclusion	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Ackerman v. American Cyanamid Co., 586 N.W.2d 208 (Iowa 1998) 13

Ackles v. Luttrell, 252 Neb. 273, 561 N.W.2d 573, *cert. denied*, 522 U.S. 928 (1997) 13

American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) 2

Andrus v. AgrEvo USA Co., 178 F.3d 395 (5th Cir. 1999) 10, 12

Arkansas-Platte & Gulf Partnership v. Van Waters and Rogers, Inc., 959 F.2d 158 (10th Cir. 1992) 12

Arkansas-Platte & Gulf Partnership v. Van Waters and Rogers, Inc., 506 U.S. 910 (1992) 12

Arkansas-Platte & Gulf Partnership v. Dow Chem. Co., 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993) 12, 13

Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994) 13

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 3, 5, 21

Cited Authorities

	Page
Christensen v. Harris County, 529 U.S. 576 (2000)	21
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)	7, 8, 9, 11, 12, 21, 22, 25
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	1, 2, 3
Davidson v. Velsicol Chem. Corp., 108 Nev. 591, 596, 834 P.2d 931 (1992), *cert. denied*, 507 U.S. 1051 (1993)	13
Eide v. E.I. du Pont de Nemours & Co., 542 N.W.2d 769 (S.D. 1996)	13
Etcheverry v. Tri-Ag Service, Inc., 22 Cal. 4th 316, 993 P.2d 366 (2000)	5, 10, 13, 20, 22
Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989)	1, 2
Goodwin v. Bacon, 127 Wash. 2d 50, 896 P.2d 673 (1995)	13
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	1, 3
Gorton v. American Cyanamid Co., 194 Wis. 2d 203, 533 N.W.2d 746 (1995), *cert. denied*, 516 U.S. 1067 (1996)	13

Cited Authorities

Page

Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559 (1st Cir. 1996) 12, 13

Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244 (3d Cir. 1999) 12

Hochberg v. Zoecon Corp., 421 Mass. 456, 657 N.E.2d 1263 (1995) 13

Hopkins v. American Cyanamid Co., 666 So. 2d 615 (La. 1996) 13

Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964) 2

Hue v. Farmboy Spray Co., 127 Wash. 2d 67, 896 P.2d 682 (1995) 22

Jenkins v. Amchem Products, Inc., 256 Kan. 602, 886 P.2d 869 (1994), *cert. denied*, 516 U.S. 820 (1995) 11, 13

King v. E.I. du Pont Nemours & Co., 996 F.2d 1346 (1st Cir. 1993) 11

Kuiper v. American Cyanamid Co., 131 F.3d 656 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998) 12

Lewis v. American Cyanamid Co., 155 N.J. 544, 715 A.2d 967 (1998) 13

Cited Authorities

Page

MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994) 10

McAlpine v. Rhone-Poulenc Agric. Co., 285 Mont. 224, 947 P.2d 474 (1997) 4, 13, 20

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 7, 8, 9, 13, 19, 20, 21, 22, 25

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997) 21

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 21

National Bank of Commerce v. Dow Chem. Co., 165 F.3d 602 (8th Cir. 1999) 12

Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir 1991) 12, 16

Papas v. Upjohn Co., 985 F.2d 516 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993) 12

Papas v. Upjohn, Inc., 505 U.S. 1215 (1992) 12

Pitts v. Dow Chem. Co., 859 F. Supp. 543 (M.D. Ala. 1994) 15

Cited Authorities

Page

Quest Chem. Corp. v. Elam, 898 S.W.2d 819 (Tex. 1995) 13

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 14, 15

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 9

Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993) 10

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 21

Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 11, 12, 13

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 10, 11, 18

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) 10, 12

Wright v. American Cyanamid Co., 599 N.W.2d 668 (Iowa 1999) 13

Cited Authorities

	Page
Statutes:	
7 U.S.C. § 136(p)(1)	15
7 U.S.C. § 136(p)(2)	16
7 U.S.C. § 136(q)	16
7 U.S.C. § 136a(a)	15
7 U.S.C. § 136a(c)(1)(C)	16
7 U.S.C. § 136a(c)(5)(B)	15, 16
7 U.S.C. § 136a(c)(9)	16
7 U.S.C. § 136j(a)(2)(G)	17
7 U.S.C. § 136l	17
7 U.S.C. § 136v	4
7 U.S.C. § 136v(a)	10, 11
7 U.S.C. § 136v(b)	i, 2, 4, 6, 8, 10, 11, 12, 17, 19, 22, 24
7 U.S.C. § 136v(c)	24
15 U.S.C. § 1334(b)	7
21 U.S.C. § 360k(b)	22

Cited Authorities

Page

28 U.S.C. § 1257 1

28 U.S.C. § 2101(c) 1

Rule:

Sup. Ct. R. 13.3 1

Other Authorities:

Insecticide Act of 1910, 36 Stat. 331 14

40 C.F.R. § 152.50(e) 16

40 C.F.R. § 152.130(a) 16

40 C.F.R. § 156.10(a)(5)(viii) 16

40 C.F.R. § 156.10(a)(5)(ix) 16

40 C.F.R. § 156.10(a)(6) 16

40 C.F.R. § 156.10(h) 16

40 C.F.R. § 156.10(h)(1) 16

40 C.F.R. § 156.10(h)(1)(i)(A) 16

40 C.F.R. § 156.10(h)(1)(i)(E) 16

Cited Authorities

	Page
40 C.F.R. § 156.10(h)(2)(i)(A)	16
40 C.F.R. § 156.10(i)	16
40 C.F.R. § 156.10(i)(1)(i)	16
40 C.F.R. § 156.10(i)(1)(ii)	16
40 C.F.R. § 156.10(i)(2)	16
40 C.F.R. § 156.10(i)(2)(ii)	17
40 C.F.R. § 156.10(i)(2)(vi)	17
40 C.F.R. § 156.210	17
40 C.F.R. § 162.2(c) (1947 ed.)	14
Federal Pesticide Control Act of 1971: Hearings Before the House Comm. on Agriculture, 92d Cong. 42 (1971)	25
Food Quality Protection Act of 1996, Pub. L. No. 104, 1996 U.S.C.C.A.N. (110 Stat.) 1489	22
H.R. 10729, 92d Cong. § 23(b) (June 7, 1972) (Senate bill as amended)	24
H.R. 10729, 92d Cong. § 23(c) (June 7, 1972) (Senate bill as amended)	24

Cited Authorities

Page

H.R. 10729, 92d Cong. § 24(b) (September 16, 1971) (House bill) 24, 25

H.R. 10729, 92d Cong. § 24(c) (September 16, 1971) (House bill) 24

H.R. Rep. No. 80-313 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200 14

H.R. Rep. No. 92-511 (1971) 24

S. Rep. No. 92-838 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993 ..... 19, 24

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of The State Of Montana Dated, Decided And Filed December 28, 2000 ..... 1a

Appendix B — Order Of The Montana First Judicial District Court, Lewis And Clark County On Motion For Summary Judgment Dated January 8, 1999 ..... 33a

Appendix C — Final Judgment Of The Montana First Judicial District Court, Lewis And Clark County Pursuant To Rule 54(b) M.R.C.P. Dated February 22, 1999 ..... 43a

Appendix D — Order Of The Supreme Court Of The State Of Montana Denying Petition For Rehearing Dated And Filed February 1, 2001 ..... 45a

Appendix E — Brief *Amicus Curiae* For The United States In *Etcheverry, et al. v. Tri-Ag Service, Inc., et al.*, Supreme Court Of California, No. S072524 Dated March, 1999 ..... 47a

Appendix F — Relevant Statute 130a

OPINIONS BELOW

The opinion of the Supreme Court of Montana is published at 16 P.3d 1042, and is reproduced in the Appendix ("App.") at 1a. The order of the Supreme Court of Montana denying rehearing is unpublished. App. 45a. The opinion of the trial court granting summary judgment is unpublished. App. 33a.

JURISDICTION

The decision of the Supreme Court of Montana was entered on December 28, 2000. Petitioners DowElanco, Epco, Inc. and Rofan Services Inc. (collectively, "DowElanco") timely filed a petition for rehearing on January 12, 2001. The Supreme Court of Montana denied the petition for rehearing on February 1, 2001. This petition for writ of certiorari is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.3.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The decision below is not a final judgment in the conventional sense. It is, however, final for purposes of this Court's review under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The fourth category in *Cox Broadcasting* involves "situations where the federal issue has been finally decided in the state courts with further proceedings pending . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action. . . ." 420 U.S. at 482-83.

> In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 483. *Accord Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-57 (1989); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988).

The federal question has been finally decided in the state courts. The Montana Supreme Court held that 7 U.S.C. § 136v(b)'s preemption of state law imposing labeling requirements on a FIFRA-registered pesticide does not apply to state law claims challenging the adequacy of the EPA-accepted labeling. App. 27a. It therefore reversed the trial court's final judgment for DowElanco on the preemption ground, *id.* 28a, and also denied rehearing on that federal issue, *id.* 45a.

Reversal of the Montana Supreme Court on the preemption issue would preclude any further litigation on the relevant cause of action. As the trial court ruled, DowElanco would be entitled to judgment on respondents' state law claims that challenge the EPA-approved pesticide labeling. App. 33a.[1]

Finally, "a refusal immediately to review" the Montana Supreme Court's decision "might seriously erode" the federal statutory policy precluding States from imposing labeling

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1. If this Court grants review and reverses the Montana Supreme Court on the preemption question, there may remain an issue (to be remanded to the Montana Supreme Court) whether all of respondents' state law claims against DowElanco are label-based. *See* App. 2a-3a (the Montana Supreme Court declined to decide that issue). This does not affect the finality analysis. Under *Cox Broadcasting*, the question is whether "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant *cause of action*. . . ." 420 U.S. at 482-83 (emphasis added). Reversal of the Montana Supreme Court "would be preclusive of any further litigation on" the respondents' claims that unquestionably challenge the EPA-accepted labeling for the pesticide products. *See, e.g.*, App. 36a (admission to the trial court that some claims were label-based). *See also Fort Wayne Books*, 489 U.S. at 53, 55 (case final for review under fourth category of *Cox Broadcasting* where reversal of state court decision would preclude further litigation on RICO counts, although six counts alleging violation of a different statute would remain). It is also irrelevant to finality for review that respondents have claims pending against other parties in the trial court. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 279 n.7 (1980) (plurality opinion); *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

requirements for FIFRA-registered pesticides. The centrality of labeling to FIFRA's scheme of federal pesticide regulation, including the federal regulator's decision whether to allow the pesticide to be registered and used at all, and the consequent necessity to preempt state labeling requirements, are discussed at pp. 15-18, *infra*. This situation is similar to *Goodyear Atomic*. In that case, this Court held final under the fourth category of *Cox Broadcasting* a state supreme court decision that the Atomic Energy Act of 1954 did not preempt state law providing enhanced workers' compensation awards for injuries caused by the employer's failure to comply with state safety requirements. 486 U.S. at 176-80.

In this case, the threat to erode the federal statutory policy is magnified by the ground for the state supreme court decision. The Montana Supreme Court held that FIFRA's preemption of state pesticide labeling requirements does not include state law tort claims, notwithstanding that the overwhelming weight of prior authority, including its own precedent, had held to the contrary. App. 27a-28a. The court based its decision on a "Brief Amicus Curiae For The United States" filed in a California case in 1999. App. 15a-16a; *see id.* 47a-129a. Because the *amicus* brief was filed by attorneys for the EPA, the Montana court held that the legal arguments contained in the brief are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If there "remain[ed] in effect the unreviewed decision of the State Supreme Court," *Cox Broadcasting*, 420 U.S. at 485, which in effect holds that this 1999 *amicus* brief filed in another case constitutes the federal agency changing FIFRA preemption law, the decision would have "important implications for the regulation of federally [registered pesticides] . . . in other States," *Goodyear Atomic*, 486 U.S. at 180. *See* pp. 18-23, *infra*.

STATUTE INVOLVED

7 U.S.C. § 136v(b) provides:

> Authority of States * * *
>
> (b) Uniformity. Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v is fully set forth at App. 130a.

STATEMENT OF THE CASE

Respondents Libby Sleath, Mary Ann Hayes, Glenda Truesdell and Mary Owen brought this action against DowElanco and others asserting claims under Montana law for injuries allegedly caused by exposure to pesticides. Respondents' claims against DowElanco are based on their alleged exposure to pesticides that DowElanco manufactures. App. 5a. The pesticides allegedly were applied at respondents' place of employment by a commercial applicator. App. 3a. The DowElanco pesticide products at issue are registered by the EPA pursuant to FIFRA. App. 4a. The trial court granted summary judgment for DowElanco because respondents' claims are based on the EPA-accepted labeling for the pesticides and, therefore, are preempted by FIFRA. App. 38a-42a. Among other authorities holding that FIFRA preempts state law actions challenging the labeling for a federally-registered pesticide, the trial court relied on the Supreme Court of Montana's decision in *McAlpine v. Rhone-Poulenc Agric. Co.*, 285 Mont. 224, 947 P.2d 474 (1997). App. 35a-36a.

On review, Montana Supreme Court overruled its *McAlpine* decision and reversed the trial court's judgment for DowElanco. App. 27a-28a. As the reason for its changed position, the Montana court gave deference to the arguments in a Brief *Amicus Curiae* for the United States filed in March, 1999, in an unrelated

crop damage case before the Supreme Court of California, *Monique Etcheverry v. Tri-Ag Service, Inc., et al.*, No. S072524. The respondents in this case submitted a copy of the *amicus* brief in *Etcheverry* as an appendix to their appellate brief, and the Montana Supreme Court took judicial notice of it. App. 15a-16a. The *amicus* brief in *Etcheverry* was filed by attorneys from the EPA and U.S. Department of Justice, is reproduced at App. 47a-129a, and is referred to here as the "EPA *Amicus* Brief."

The California Supreme Court in *Etcheverry* had rejected the arguments in the EPA *Amicus* Brief and adhered to the extraordinarily large body of case law holding that FIFRA preempts state law damages actions based on labeling for EPA-registered pesticides. *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 993 P.2d 366 (2000). The Montana Supreme Court concluded, however, that the EPA *Amicus* Brief was entitled to deference under *Chevron*. App. 15a-16a. The Montana court's opinion adopts wholesale the arguments advanced in the EPA *Amicus* Brief, including that:

- This Court "reached different conclusions" about whether Congress intended the statutory term "requirements" to encompass state law damages actions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). (*Compare* App. 20a *with id.* 72a-73a).

- The "indirect pressure" on pesticide manufacturers to change their labels, which may result from damages liability actions based on the labeling, cannot be characterized as imposing labeling requirements. (*Compare* App. 23a *with id.* 77a-83a).

- The prohibition on state labeling "requirements" in 7 U.S.C. § 136v(b) represents an exception

to a "general grant of state authority" to "regulate" pesticide sales and use in 7 U.S.C. § 136v(a). (*Compare* App. 22a *with id.* 76a).

- Silence about state law damages actions in FIFRA's legislative history indicates that Congress did not intend the term "requirements" to include such state law actions. (*Compare* App. 24a-26a *with id.* 89a-101a).

- Preemption of state law actions conflicts with FIFRA's consumer protection purposes. (*Compare* App. 26a-27a *with id.* 101a-104a).

Based on these and similar arguments in the EPA *Amicus* Brief, the Montana Supreme Court held that the state law "requirements" preempted by 7 U.S.C. § 136v(b) do not include state law actions for damages.

REASONS FOR GRANTING THE WRIT

I. The Opinion Of The Supreme Court Of Montana Conflicts With This Court's Holdings Under Analogous Federal Preemption Statutes.

The applicable section of FIFRA, entitled "Uniformity," provides that a "State shall not impose or continue in effect any *requirements* for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (emphasis added). The Supreme Court of Montana, adopting an argument in the EPA *Amicus* Brief, ruled that "Congress intended the term 'requirements' in §136v(b) of FIFRA to mean enactments of positive law by legislative or administrative bodies, not state law damage actions." App. 27a. This Court has twice held, however, that when used by Congress in the preemption context, the term "requirements" includes state law damages actions.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a majority of the Court found that the term "requirement" in the Public Health Cigarette Smoking Act of 1969 includes state law damages actions. *Id.* at 521-22 (Stevens, J., joined by Rehnquist, C. J., and White and O'Connor, JJ.); *id.* at 548-49 (Scalia, J., joined by Thomas, J.). There, the plaintiff sued cigarette manufacturers under state law for failure to warn consumers of the hazards of smoking. *Id.* at 509. The defendants argued that state law claims were preempted by 15 U.S.C. § 1334(b), which provided:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

The Court agreed that this statutory language indicated legislative intent to bar state common law actions as well as other state regulation of cigarette labeling:

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules.

Cipollone, 505 U.S. at 521 (plurality opinion); *see also id.* at 548-49 (Scalia J., joined by Thomas, J.) ("agree[ing]" with this analysis and conclusion).

Similarly, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), which involved the preemption provision of the Medical Device Amendments ("MDA") to the Federal Food, Drug and Cosmetic Act, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, stated that "[a]s explained above, and as JUSTICE BREYER agrees, . . . the term 'requirement'

encompasses state common-law causes of action." 518 U.S. at 512. Justice Breyer did indeed agree:

> This action raises two questions. First, do the Medical Device Amendments of 1976 (MDA) to the Federal Food, Drug, and Cosmetic Act ever pre-empt a state-law tort action? . . . My answer to the first question is that the MDA will sometimes preempt a state-law tort suit. I basically agree with JUSTICE O'CONNOR'S discussion of this point and with her conclusions. . . . The statute's language, read literally, supports that conclusion.

Id. at 503. Justice Breyer further stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." *Id.* at 504.[2]

In short, the decision below is premised on the conclusion — argued in the EPA *Amicus* Brief — that "requirements" in 7 U.S.C. § 136v(b) do not encompass state law damages actions. A majority of this Court in *Cipollone,* and again in *Medtronic,* rejected this conclusion in the context of analogous federal preemption statutes.

This Court also has rejected the reasoning relied upon by the Supreme Court of Montana in reaching its conclusion. The Montana court, adopting the argument in the EPA *Amicus* Brief, said that "[i]ndirect pressure on pesticide manufacturers to change their labels, which may result from liability in damage actions, cannot be characterized as labeling 'requirements.' " App. 23a, 82a-83a. In *Cipollone*, however, a majority of the

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2. No member of the Court in *Medtronic* disagreed on this specific point (*i.e.*, that state law "requirements" under the MDA include state law tort actions). *See* 518 U.S. at 502-03 (plurality opinion) (declining to decide issue); *id.* at 505 (Breyer, J.) ("it is possible that [the plurality opinion] also agrees" that "requirement" encompasses state law tort actions).

Court found this argument "at odds with the plain words of the 1969 Act and with the general understanding of common-law damages actions." 505 U.S. at 521 (plurality opinion); *id.* at 548-49 (Scalia, J., joined by Thomas, J.). Justice Stevens' plurality opinion explained:

> As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Id. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon* 359 U.S. 236, 247 (1959)).

In *Medtronic*, a majority agreed. Justice O'Connor, writing for four members of the Court, concluded: "Whether relating to the labeling of cigarettes or the manufacture of medical devices, state common-law damages actions operate to require manufactures to comply with common-law duties." 518 U.S. at 510.

> As *Cipollone* declared, in answer to the same argument raised here that common-law actions do not impose requirements, "such an analysis is at odds both with the plain words" of the statute and "with the general understanding of common-law damages actions."

Id. at 510-11 (emphasis added). Writing separately, Justice Breyer agreed *Cipollone* made clear that "similar language 'easily' encompassed tort actions because '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.' " 518 U.S. at 504 (quoting *Cipollone*, 505 U.S. at 521).[3]

3. Lower courts likewise have understood the effect of imposing damages liability on a pesticide registrant for using the EPA-accepted labeling:

(Cont'd)

The Montana Supreme Court also based its conclusion on an argument concerning another FIFRA provision, which states that "[a] state may regulate the *sale or use* of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a) (emphasis added). In a statement taken verbatim from the EPA *Amicus* Brief (App. 76a), the Montana Supreme Court reasoned that "§ 136v(b)'s prohibition on state labeling 'requirements' represents an exception to § 136v(a)'s general grant of state authority to 'regulate' pesticide sales and use." App. 22a. Thus, the Montana court concluded, "in § 136v, Congress used the term 'requirements' to mean 'regulation,' a term connoting positive commands of law, not court orders to pay damages for the harms caused by pesticides." App. 21a. This reasoning, however, directly conflicts with another decision of this Court.

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991), expressly held that 7 U.S.C. § 136v(a) is *not* a "general grant of authority" to the States.

(Cont'd)

> Because the "undeniable practical effect" of [plaintiff's] recovering a large damage award on his claims that the manufacturer failed to meet state labeling requirements and failed to warn [plaintiff] of potential adverse effects would be the imposition of additional labeling standards not mandated by FIFRA, . . . such claims are preempted.

Andrus v. AgrEvo USA Co., 178 F.3d 395, 398-99 (5th Cir. 1999) (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)). In rejecting the contrary argument in the EPA *Amicus* Brief, the court to which that Brief was addressed noted that other courts have found the argument to be "sophistry," "silly," and premised upon an "illusory" distinction. *Etcheverry*, 22 Cal. 4th at 327, 993 P.2d at 372 (quoting *MacDonald*, 27 F.3d at 1025; *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 370 (7th Cir. 1993); and *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993)).

> The *specific* grant of authority in § 136v(a) . . . ***does not serve to hand back to the States powers that the statute had impliedly usurped.*** Rather, it acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.

501 U.S. at 614 (emphasis added).[4] It follows from *Mortier* that the "requirements" in §136v(b) are *not* a "subset of state 'regulation' " in § 136v(a).[5]

Furthermore, because "requirements" in § 136v(b) is not a subset of "regulation" in § 136v(a), the statute's use of the different terms affirmatively shows that state law damages actions are preempted by the former provision. As noted in *Cipollone*, "requirements" is a broader preemption term than "regulation." *See* 505 U.S. at 520-21 & n.19 (plurality opinion) (the 1969 Cigarette Act's preemption clause, which bars "'requirement[s] or prohibition[s] . . . imposed under State law,'" is "much broader" than its predecessor in the 1965 version of the statute, which was "concerned primarily with 'regulations' — positive enactments, rather than common-law damages actions").

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4. This point was important to the holding in *Mortier*. It rebutted the contention that political subdivisions of States were disabled from regulating pesticide use because § 136v(a) gave regulatory authority only to "State" government — a theory that collapsed if (as the Court held) § 136v(a) is not a general grant of authority in the first place.

5. *Accord, e.g., Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995) ("§ 136v(a) does not limit the preemption scope of § 136v(b)"); *King v. E.I. du Pont Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993) (§ 136v(a) is "not a limitation upon the preemptive effect of subsection (b)"); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 619, 886 P.2d 869, 880 (1994) (rejecting argument that "[b]ecause 'regulate' [in § 136v(a)] refers only to positive legislative or rulemaking actions, the term 'requirements' in § 136v(b) is limited to positive enactments"), *cert. denied*, 516 U.S. 820 (1995).

II. The Opinion Of The Montana Supreme Court Conflicts With Overwhelming Authority Holding That FIFRA Preempts State Law Damages Actions That Challenge The Labeling For A Federally-Registered Pesticide.

When *Cipollone* was decided, two FIFRA preemption cases (decided on implied field preemption grounds) were pending on petitions for a writ of certiorari. *Papas v. Upjohn Co.*, 926 F.2d 1019, 1026 (11th Cir 1991) (*"Papas I"*); *Arkansas-Platte & Gulf Partnership v. Van Waters and Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992) (*"Arkansas-Platte I"*). This Court vacated *Papas I* and *Arkansas-Platte I*, and remanded for further consideration in light of *Cipollone*. *Papas v. Upjohn, Inc.*, 505 U.S. 1215 (1992); *Arkansas-Platte & Gulf Partnership v. Van Waters and Rogers, Inc.*, 506 U.S. 910-11 (1992). On remand, both circuit courts determined that § 136v(b) expressly preempts state law failure to warn claims based upon pesticide labeling. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.) (*"Papas II"*), *cert. denied*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf Partnership v. Dow Chem. Co.*, 981 F.2d 1177 (10th Cir.) (*"Arkansas-Platte II"*), *cert. denied*, 510 U.S. 813 (1993).

Since *Cipollone*, every federal circuit court of appeals and every state court of last resort to address the issue has held that FIFRA preempts state law causes of action based upon the labeling for a FIFRA-registered pesticide.[6] In addition, courts

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6. *E.g.*, *National Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 608 (8th Cir. 1999); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 398 (5th Cir. 1999); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 249 (3d Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Taylor AG Indus. v. Pure Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *Papas II*, 985 F.2d 518 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993); *Arkansas-Platte II*, 981 F.2d 1177, (Cont'd)

that directly considered the question — other than the Supreme Court of Montana in this case — have recognized that this Court's *Medtronic* decision supports the conclusion that FIFRA's statutory term "requirements" includes state law tort actions. *See, e.g., Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996) (it "is now settled by the Supreme Court in *Cipollone* and [*Medtronic v.*] *Lohr*, that 'requirements' in this context presumptively includes state causes of action as well as laws and regulations."); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208, 212-13 (Iowa 1998) (collecting cases).

The Montana Supreme Court's opinion in this case, and the arguments in the EPA *Amicus* Brief upon which it relies, conflict with this overwhelming weight of authority. Until this case, this authority included the Supreme Court of Montana. *McAlpine*, 285 Mont. at 229-30, 947 P.2d at 477. Now, the FIFRA preemption outcome in Montana depends on whether the case is in state or federal court. *Compare Sleath*, 16 P.3d 1042, *with Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995).

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1179 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 329, 993 P.2d 366, 373 (2000); *Wright v. American Cyanamid Co.*, 599 N.W.2d 668, 671 (Iowa 1999); *Lewis v. American Cyanamid Co.*, 155 N.J. 544, 552, 715 A.2d 967, 971 (1998); *Ackles v. Luttrell*, 252 Neb. 273, 283, 561 N.W.2d 573, 579, *cert. denied*, 522 U.S. 928 (1997); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615, 621 (La. 1996); *Eide v. E.I. du Pont de Nemours & Co.*, 542 N.W.2d 769, 772 (S.D. 1996); *Hochberg v. Zoecon Corp.*, 421 Mass. 456, 460-61, 657 N.E.2d 1263, 1266 (1995); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995); *Goodwin v. Bacon*, 127 Wash. 2d 50, 56-57, 896 P.2d 673, 676-77 (1995); *Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 219-20, 533 N.W.2d 746, 753 (1995), *cert. denied*, 516 U.S. 1067 (1996); *Jenkins v. Anchem Products, Inc.*, 256 Kan. 602, 617-18, 886 P.2d 869, 879, *cert. denied*, 516 U.S. 820 (1994); *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 737-38, 450 S.E.2d 671, 676 (1994); *Davidson v. Velsicol Chem. Corp.*, 108 Nev. 591, 596, 834 P.2d 931, 934 (1992), *cert. denied*, 507 U.S. 1051 (1993).

III. The Opinion Of The Montana Supreme Court Threatens Seriously To Erode Federal Policy.

A. Labeling Is Central To FIFRA's Regulatory Scheme.

There has been a significant federal presence in the area of pesticide regulation since the enactment of the Insecticide Act of 1910, 36 Stat. 331, which made it unlawful to manufacture and sell insecticides that were adulterated or misbranded. In 1947, Congress repealed the Insecticide Act and enacted FIFRA to "expand the protection afforded" the public due to the greatly increased use of "economic poisons."[7] H.R. Rep. No. 80-313 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200. In 1972, new legislation broadened FIFRA into a "comprehensive regulatory statute" governing the use, sale, and labeling of pesticides. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). This Court described these changes as follows:

> Because of mounting public concern about the safety of pesticides and their effect on the environment and because of a growing perception that the existing legislation was not equal to the task of safeguarding the public interest, see S. Rep. No. 92-838, at 3-9; S. Rep. No. 92-970, p. 9 (1972); H. R. Rep. No. 92-511, at 5-13, Congress undertook a comprehensive revision of FIFRA through the adoption of the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973. The amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute. H. R. Rep. No. 92-511, at 1. As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review,

7. "Economic poison" included insecticides, fungicides, rodenticides, and herbicides. 40 C.F.R. § 162.2(c) (1947 ed.).

> cancellation, and suspension of registration; and gave EPA greater enforcement authority. Congress also added a new criterion for registration: that EPA determine that the pesticide will not cause "unreasonable adverse effects on the environment." §§ 3(c)(5)(C) and (D), 86 Stat. 980-981.

Id. at 991-92.

In enacting the 1972 federal regulatory scheme, Congress recognized "that pesticides — many of which can be poisonous to humans as well as the target pests — have 'both beneficial and deleterious' effects, and it designated the Administrator of the EPA as the party to conduct the necessary balancing analysis." *Pitts v. Dow Chem. Co.*, 859 F. Supp. 543, 548 (M.D. Ala. 1994) (quoting legislative history). Thus, the cornerstone of FIFRA regulation is the requirement that all pesticides sold or distributed in the United States must be registered by the EPA. 7 U.S.C. § 136a(a).

As one of several criteria to register a pesticide, the EPA must determine that "its labeling and other material required to be submitted comply with [FIFRA's] requirements. . . ." 7 U.S.C. § 136a(c)(5)(B). The statute defines "[t]he term 'label' " as

> the written, printed or graphic matter on, or attached to, the pesticide . . . or any of its containers or wrappers.

7 U.S.C. § 136(p)(1). FIFRA defines "[t]he term 'labeling' " much more broadly, to

> mean[] all labels and all other written, printed or graphic matter — (A) accompanying the pesticide . . . at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide . . . except [certain official research publications].

7 U.S.C. § 136(p)(2). A pesticide registrant must submit proposed labeling to the EPA as part of the initial registration application, and the EPA's acceptance of the registrant's final labeling is a condition of registration. 7 U.S.C. §§ 136a(c)(1)(C), 136a(c)(5)(B); 40 C.F.R. §§ 152.50(e), 156.10(a)(6). Once registered, EPA regulations provide that "[a] registrant may distribute or sell a registered product with the composition, packaging and labeling currently approved by the Agency." 40 C.F.R. § 152.130(a).

The statute provides many standards and requirements to govern pesticide labeling, *e.g.*, 7 U.S.C. §§ 136(q), 136a(c)(9), and EPA regulations establish many more. *Papas I*, 926 F.2d at 1024 ("In 40 C.F.R. Part 156, the EPA has regulated almost every aspect of pesticide labeling."). For example, the regulations contain "[s]pecific requirements concerning content, placement, type size, and prominence" of "warnings and precautionary statements." 40 C.F.R. § 156.10(h). The text required on the front label panel is determined by the Toxicity Category of the pesticide. *Id.* § 156.10(h)(1). If a pesticide is in the highest toxicity category (Category I), the front panel must contain the signal word "DANGER." *Id.* § 156.10(h)(1)(i)(A). Similar specifications exist for lesser toxicity categories. The manufacturer may not use a signal word associated with a higher toxicity category unless the EPA requires it under 40 C.F.R. § 156.10(h)(1)(i)(E). *See also e.g., id.* § 156.10(h)(2)(i)(A) (required precautionary statement below the signal word, indicating the hazard, routes of exposure, and precautions to avoid injury); *id.* § 156.10(a)(5)(viii) (disclaimers prohibited); *id.* § 156.10(a)(5)(ix) (safety claims prohibited).

The pesticide labeling must contain directions for use. *Id.* § 156.10(i). The directions "must be adequate," *inter alia*, "to protect the public . . . from personal injury. . . ." *Id.* § 156.10(i)(1)(i). The EPA regulates both the placement (*id.* § 156.10(i)(1)(ii)) and the content (*id.* § 156.10(i)(2)) of the directions. Directions must include, for example,

"[t]he method of application, including instructions for dilution, if required, and type(s) of application apparatus or equipment required. . . ." *Id.* § 156.10(i)(2)(vi). In some circumstances, the directions must instruct the user to provide warning and other information to other persons. *E.g., id.* § 156.210.

The labeling limits the purposes for which a pesticide may be used (*e.g.*, the type of insect to be controlled). Frequently, the labeling will limit the persons who may use the pesticide, such as limiting use to professional applicators. The DowElanco pesticides at issue are labeled for use only by or under the direct supervision of commercial applicators responsible for insect control programs, or by formulators for use in manufacturing other pesticides. *See* App. 4a-5a. The labeling for just one of those pesticides contains 23 pages of single-spaced text.

Users' adherence to the directions is also enforced by law. It is a statutory violation, punishable by civil and criminal penalties, "to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G); *see also* 7 U.S.C. § 136*l* (penalties for FIFRA violations). The pesticide labeling must state: "It is a violation of Federal law to use this product in a manner inconsistent with its labeling." 40 C.F.R. § 156.10(i)(2)(ii).

The FIFRA preemption provision at issue — entitled "Uniformity" — ensures that the labeling requirements imposed by the EPA are nationally uniform by forbidding States from imposing any requirements for pesticide labeling different from or in addition to those imposed by the EPA. 7 U.S.C. § 136v(b). As Congress recognized, the balancing of the risks of pesticides and their benefits to society requires a system of uniform labeling. Most obviously, the EPA may determine that, although a pesticide poses certain risks of adverse health or other effects on the environment, those effects are not unreasonable when the pesticide is used for specified purposes, according to certain directions, and with certain warnings. Thus, the labeling for a federally-registered pesticide is fundamental to the EPA's

determination whether to register a pesticide in the first instance. Further, if the EPA determines that a pesticide does not pose unreasonable adverse effects on the environment only with certain directions for use or warnings, it is critical that everyone receive the same directions or warnings.[8]

B. The Decision Below Threatens The FIFRA Labeling Scheme Based Upon An Erroneous View Of The Legal Effect Of The EPA *Amicus* Brief Under Federal Law.

In enacting FIFRA, Congress recognized that pesticides are necessary to modern society, including protection of public health and assurance of adequate food supply. As noted, Congress therefore provided for the EPA to balance the benefits of pesticides against the risks posed by their use.[9] The EPA makes

8. The EPA itself has commented on the necessity of this exclusively federal approach to pesticide labeling:

> To be sure, an exclusively federal approach is necessary in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in States and localities across the country, Congress clearly preempted all but federal regulation of labels. *See* 7 U.S.C. § 136v(b).

Brief for the United States as Amicus Curiae Supporting Petitioners at 22, *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (No. 89-1905).

9. The question [the Administrator] must decide is "Is it better for man and the environment to register this pesticide, or is it better that this pesticide be banned?" He must consider hazards to farm workers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain where it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort

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the risk/benefit decisions based on scientific research and the agency's expertise, and in light of warnings, directions for use and other labeling.

FIFRA's preemption provision, 7 U.S.C. § 136v(b), assures pesticide manufacturers that the EPA's determinations regarding the appropriateness of that labeling will not be subject to second-guessing, which helps ensure the availability of pesticides the EPA determines should be registered with the labeling accepted by the agency. The preemption assurance is particularly important for pesticides that have higher degrees of risk, low profit margins or limited uses, but which are essential to control certain pests. Contrary to the statutory policy, the Montana Supreme Court's decision permits state courts and juries to impose damages liability on a pesticide registrant for obeying FIFRA and doing what federal law compels.

Permitting damages actions that challenge the labeling for federally-registered pesticides has the effect of imposing a multiplicity of labeling requirements, and does so in a most irrational way. As Justice Breyer explained in *Medtronic*:

> Imagine that in respect to a particular hearing aid component, a federal MDA regulation requires a 2-inch wire, but a state agency regulation requires a 1-inch wire. If the federal law, embodied in the "2-inch" MDA regulation, pre-empts the state

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> and health of man. All these factors he must consider, giving each its due. No one should be given undue consideration, no one should be singled out for special mention, no one should be considered a "vital" criterion.
>
> . . . In each case the Administrator must take into account all relevant factors and decide whether it is better for man and the environment that this product be registered.

S. Rep. No. 92-838, pt. 2, at 10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4032-33.

> "1-inch" agency regulation, why would it not similarly pre-empt a state law tort action that premises liability upon the defendant manufacturer's failure to use a 1-inch wire (say, an award by a jury persuaded by expert testimony that use of a more than 1-inch wire is negligent)? The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes *would grant greater power (to set state standards "different from, or in addition to," federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes*. . . . I would not take [Congress] to have intended this anomalous result.

518 U.S. at 504 (emphasis added). The decision below, however, permits that "anomolous result" for labeling of pesticides under FIFRA.

Because Congress should not be presumed to intend anomolous results, Justice Breyer concluded that if the "MDA pre-empts a state requirement embodied in a state statute, rule, regulation, or other administrative action, it would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action." *Id.* at 504-05. The same is true for labeling requirements under FIFRA.

The Montana Supreme Court came to the opposite conclusion and overruled its *McAlpine* decision based on the arguments in the EPA *Amicus* Brief. The Montana court concluded that "because the EPA is the agency charged with administering FIFRA, we agree with Appellants that we should consider the EPA's brief in *Etcheverry* and that the EPA's interpretation of FIFRA should receive deference." App. 15a-16a. For the proposition that the deference should be given to the EPA *Amicus* Brief, the Montana Supreme Court

relied on *Chevron*, 467 U.S. 837. This is error under federal law, for two reasons.

First, the arguments and conclusion in the EPA *Amicus* Brief about FIFRA preemption are nowhere found in any EPA regulation or similar authoritative pronouncement of the agency. To the contrary, they appear only in the EPA *Amicus* Brief. As this Court has repeatedly said:

> Of course we deny deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). The deliberateness of such positions, if not indeed their authoritativeness, is suspect.

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 741 (1996); *accord Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997); *see also Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) (agency opinion letter); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) ("the courts may not accept" argument by appellate counsel as the decision of "the agency itself").

This principle applies with special force here. The relevant arguments in the EPA *Amicus* Brief do not purport to be based upon special knowledge or expertise of the agency. To the contrary, they are the same type of legal arguments any litigant would make (*e.g.*, the meaning of this Court's *Cipollone* and *Medtronic* decisions). *See* App. 70a-75a; *see also* Part IV, *infra*.[10]

Second, FIFRA is unlike the statute in *Medtronic*, where the federal agency was given special authority to determine the statute's preemptive scope. Under the MDA:

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10. A portion of the EPA *Amicus* Brief is addressed to state law claims concerning the pesticide's efficacy (*i.e.*, effectiveness). App. 104a-115a. That is not an issue in this or other cases alleging claims for personal injury, and was not relied upon by the Montana Supreme Court.

> [P]re-emption . . . does not arise directly as a result of the enactment of the statute; rather in most cases a state law will be pre-empted only to the extent the FDA has promulgated a relevant federal "requirement."

Medtronic, 518 U.S. at 496. In addition:

> Congress explicitly delegated to the FDA the authority to exempt state regulations from the pre-emptive effect of the MDA — an authority that necessarily requires the FDA to assess the pre-emptive effect that the Act and its own regulations will have on state laws.

Id. (citing 21 U.S.C. § 360k(b)); *see also id.* at 505-06 (Breyer, J.). Neither is true under FIFRA. The statute expressly and of its own force preempts state law requirements for pesticide labeling. 7 U.S.C. § 136v(b); *cf. Medtronic*, 518 U.S. at 489 n.9 ("Unlike § 360k, the pre-emptive effect of the statute in *Cipollone* was not dependent on the issuance of any agency regulations. The territory exclusively occupied by federal law was defined in the text of the statute itself. . . .") (plurality opinion). In addition, Congress did not delegate to the EPA any authority to limit FIFRA's preemptive effect on labeling. *Etcheverry*, 22 Cal. 4th at 330, 993 P.2d at 373-74; *see also Medtronic*, 518 U.S. at 512 (O'Connor, J.) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference") (emphasis in original).[11]

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11. *See also Hue v. Farmboy Spray Co.*, 127 Wash. 2d 67, 84-85, 896 P.2d 682, 691-92 (1995) (discussing the "significance [of] the fact that Congress has remained silent in the face of *Cipollone* and its FIFRA progeny"). Indeed, after the 1995 decision in *Hue* and the "'tsunami' wave" of FIFRA preemption precedent *Hue* noted (*id.*), Congress amended FIFRA — and left the express preemption provision unchanged. Food Quality Protection Act of 1996, Pub. L. No. 104-170, 1996 U.S.C.C.A.N. (110 Stat.) 1489.

Under these principles of federal law, the EPA *Amicus* Brief is not a proper basis for rejecting the plain meaning of the statutory language and the longstanding case authority that FIFRA's preemption of state law labeling requirements includes state law tort claims. At the same time, the Montana Supreme Court's reliance on the EPA *Amicus* Brief poses a particular threat to FIFRA's policy that federal law exclusively shall govern pesticide labeling. State courts particularly are frequently unsympathetic to federal preemption of state law. Such courts may be only too happy to allow state law claims challenging EPA-accepted pesticide labeling on the ground that they are merely following the federal agency's "interpretation" of federal law. This special threat to the federal statutory policy particularly warrants this Court's review.

IV. Other Arguments The Montana Supreme Court Adopted From The EPA *Amicus* Brief Are Misguided.

A. "Silence" In The Legislative History.

The excursion into FIFRA's legislative history in the EPA *Amicus* Brief — adopted by the Montana court (App. 24a, 25a-26a) — sometimes suggests that state law "requirements" do not include state law damages actions because the legislative history does not specifically talk about preempting them. *E.g.*, App. 96a ("the subject of common law tort actions was raised . . . five times [in committee hearings], and not once in the context of preemption"); *id.* 99a-100a ("no Senator mentioned the preemption of state tort law").

In fact, "silence" in the legislative history about state law damages actions is substantively meaningless. Congress was preempting the States from imposing *duties* and *obligations* in regard to pesticide labeling. Rather than listing every legal method States might use to impose such duties, it was sufficient for Congress to forbid the imposition itself. For example, the EPA *Amicus* Brief argues that "an injunction imposed against a manufacturer to change its label *would* represent a state-

mandated requirement and would therefore be preempted." App. 82a (emphasis added). Nowhere, however, does the EPA *Amicus* Brief show that the legislative history says anything about such "injunctions." To accomplish its intended result, Congress needed only to do what the legislative history — not to mention the statute itself — says it did:

> [T]he Committee has adopted language which is intended *to completely preempt State authority in regard to* labeling and packaging.

H.R. Rep. No. 92-511, at 16 (1971); *see also id.* at 1-2 ("State authority to change Federal labeling and packaging is *completely* preempted") (emphasis added); S. Rep. No. 92-838, pt. 1, at 30 (1972) ("Subsection (b) preempts *any* State labeling or packaging requirements differing from such requirements under the Act"), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4021 (emphasis added).[12]

B. Supposed "Evidence" In The Legislative History.

The EPA *Amicus* Brief alternatively proclaims — and the Montana Supreme Court accepted as true (App. 26a) — that the legislative history is "replete with evidence" Congress

12. The EPA *Amicus* Brief attempts to downplay the House Committee's stated intention "to completely preempt State authority in regard to labeling" by asserting that "Congress ultimately rejected the preemption provision written by the House Agriculture Committee that would have diminished the states' authority to regulate pesticide sales and use." App. 99a. The Brief fails to explain that the divergence between the House and Senate pertained to the provision that became 7 U.S.C. § 136v(c), which concerns state authority to issue "special local needs" registrations. *Compare* H.R. 10729, 92d Cong. § 24(c) (September 16, 1971) (House bill) *with* H.R. 10729, 92d Cong. § 23(c) (June 7, 1972) (Senate version as amended). In contrast, the *relevant* provisions — the preemption provisions which eventually became 7 U.S.C. § 136v(b) — were *identical* in both the House and Senate versions of H.R. 10729. *Compare* H.R. 10729, 92d Cong. § 24(b) (September 16, 1971) (House bill) *with* H.R. 10729, 92d Cong. § 23(b) (June 7, 1972) (Senate version as amended).

intended to save state law tort claims from preemption. App. 101a. However, the principal "evidence" the EPA *Amicus* Brief relies upon is a snippet of testimony by EPA's General Counsel Quarles. App. 96a. The first problem with this "evidence" is that the bill about which Mr. Quarles was testifying, H.R. 4152 (introduced February 10, 1971), did not contain a preemption provision.[13] *See generally* H.R. 4152, 92d Cong. (1971). The second problem is that the Quarles testimony was addressed to a hypothetical tort action between two farmers for crop damage due to *misapplication* of a pesticide. *Federal Pesticide Control Act of 1971: Hearings Before the House Comm. on Agriculture*, 92d Cong. 42 (1971). The testimony had nothing to do with preemption of state labeling requirements, much less tort claims against pesticide manufacturers for failure to warn.

C. Supposed "Conflict" With FIFRA's Purposes.

The Montana Supreme Court also adopted the argument in the EPA *Amicus* Brief that preemption of state tort law conflicts with FIFRA's goal of providing increased protection from harmful effects of pesticides. App. 26a, 101a-104a. The purpose of the statute in *Medtronic*, however, was also to increase consumer protection. A majority of the Court held that purpose does not conflict with preemption of state law tort claims — any more than does preemption of state consumer protection statutes and regulations. *See* Section I, *supra*. Increased consumer protection was also the goal of the 1969 Cigarette Act, which a majority in *Cipollone* held preempted state law tort claims — no less than state consumer protection statutes and regulations. *See id.*

Congress decided that consumer protection is better achieved by mandating national uniformity for pesticide labeling

13. It was a later House bill, H.R. 10729, introduced on September 16, 1971, that contained the preemption provision. H.R. 10729, 92d Cong. § 24(b) (1971).

in place of varying and inconsistent state standards. Congress also decided that consumer protection is better achieved by an expert agency determining the contents of and other requirements for labeling, rather than having that determination made sporadically, on the basis of inadequate information, and in after-the-fact tort litigation.

Based on those decisions, Congress commanded that federal law exclusively shall govern exactly what pesticide manufacturers say and do as to all pesticide labeling. The true "conflict" is imposition of liability under state law for doing what federal law requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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